U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12013571

Date: OCT. 1, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, an IT Consulting business, seeks to employ the Beneficiary as a software developer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the labor certification was not valid for the Beneficiary's intended worksite.

The Petitioner bears the burden of establishing eligibility for the requested immigration benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the appeal for the issuance of a new decision.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a professional usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to establish that there are not sufficient U.S. workers who are available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).[1] Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant classification, and that the employer has the ability to pay the proffered wage. *See* 8 C.F.R. § 204.5.[2] Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

---

[1] Labor certification applications are filed on Form ETA 9089, Application for Permanent Employment Certification.

[2] These requirements must be satisfied by the priority date of the immigrant visa petition. *See* 8 C.F.R. § 204.5(g)(2), *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d). In this case, the priority date is June 7, 2019.

II. VALIDITY OF THE LABOR CERTIFICATION

A petition that is not accompanied by a valid labor certification is not considered properly filed and must be denied. *See* 8 C.F.R. § 204.5(a)(2), (k)(3)(i). A labor certification is valid only for the particular job opportunity and the area of intended employment stated on the Form ETA 9089. 20 C.F.R. § 656.30(c)(2). Therefore, if a petitioner intends to employ a beneficiary outside the stated area of intended employment on the labor certification, USCIS will deny the petition. *Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979).

The term "area of intended employment" means the area within normal commuting distance of the address of intended employment. *Id.* If two addresses are within the same Metropolitan Statistical Area (MSA), they are considered to be within normal commuting distance of each other. *See* 20 C.F.R. § 656.3.[3]

However, the fact that two worksites are in different MSAs does not necessarily mean that they are not within a normal commuting distance. The regulation at 20 C.F.R. § 656.3 states that:

> Area of intended employment means the area within normal commuting distance of the place (address) of intended employment. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., normal commuting distances might be 20, 30, or 50 miles). If the place of intended employment is within a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance of the place of intended employment; however, not all locations within a Consolidated Metropolitan Statistical Area (CMSA) will be deemed automatically to be within normal commuting distance. The borders of MSAs and PMSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA or PMSA (or a CMSA) may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA or PMSA (or CMSA).

In this case, the labor certification states that the primary worksite (where the work is to be performed) and the Petitioner's office address is [redacted], New Jersey [redacted] The MSA for [redacted] New Jersey is New York-Newark-Jersey City, NY-NJ-PA.[4] The immigrant visa petition states that the worksite location and the Petitioner's office address is [redacted] New Jersey [redacted], New Jersey is in the [redacted] MSA.[5]

[3] According to the U.S. Census Bureau, an MSA is "a core area containing a substantial population nucleus, together with adjacent communities having a high degree of economic and social integration with that core." https://www.census.gov/programs-surveys/metro-micro/about.html. The Office of Management and Budget delineates MSAs using census data. https://www.census.gov/programs-surveys/metro-micro.html.

[4] Office of Management and Budget, *Revised Delineations of Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and Guidance on Uses of the Delineations of These Areas*, OMB Bulletin No. 20-01 (March 6, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/Bulletin-20-01.pdf.

[5] *Id.*

The Director issued a request for evidence (RFE) instructing the Petitioner to show, among other things, that the labor certification was still valid by submitting evidence that the worksite on the petition is in the same MSA as the worksite on the labor certification. The Petitioner's response did not establish that the new office location was in the same MSA as worksite listed on the labor certification, but it did show that the worksites are a 17-mile driving distance from each other, with an estimated drive time between 28 to 36 minutes depending on the route.

The Director's decision denying the petition correctly summarized the applicable law set forth above, but erred in concluding that the labor certification is not valid solely because the two worksites are not in the same MSA. A different MSA is a relevant factor, but it is not controlling. *See* 20 C.F.R. § 656.3 (a location outside of an MSA may be within normal commuting distance of a location that is near the border of the MSA).[6] There is no rigid measure of distance which constitutes a normal commuting distance, because the concept of a normal commute may very among different areas. *Id.* Therefore, we are remanding this matter to the Director to apply the correct standard for determining a normal commuting distance under 20 C.F.R. § 656.3.[7]

On remand, the Director should ask the Petitioner to resolve an inconsistency in the record regarding the Beneficiary's qualifying employment experience. The labor certification states that the offered position requires a bachelor's degree in a computer-related field and five years of experience in an IT-related position. Section K.b. of the labor certification states that the Beneficiary's qualifying employment experience was with [redacted] in [redacted] Virginia, from March 3, 2011 until October 13, 2017. However, the experience letter in the record is on [redacted] letterhead with an address in [redacted] India, and the letter does not state that the Beneficiary was employed in [redacted] Virginia. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

III. CONCLUSION

The Director erred in concluding that the worksite address on the labor certification must be in the same MSA as the worksite address on the petition in order to be in the same "area of intended employment."

ORDER: The appeal is remanded for entry of a new decision consistent with the foregoing analysis.

[6] Even though the prevailing wage for the new worksite is lower than the original worksite, the Petitioner must still pay the Beneficiary the proffered wage stated on the labor certification.

[7] According to the U.S. Census Bureau, the New York-Newark-Jersey City, NY-NJ-PA area has an average one-way commuting time of almost 40 minutes. https://www.census.gov/library/visualizations/interactive/travel-time.html. We also note that the two worksites are in adjacent counties in New Jersey, and the border of these two counties is the demarcation line for their respective MSAs.